

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2006 Session

DAVID AUSTIN, ET AL. v. STATE OF TENNESSEE

**Appeal from the Tennessee Claims Commission
No. 20401100**

No. M2005-01300-COA-R3-CV - Filed on June 6, 2006

Plaintiffs filed a complaint against Fayette County for injuries sustained in an automobile accident at the intersection of Mount Pleasant Road and State Highway 57. The County's answer alleged that the State rather than the County maintained the stop sign, intersection and highway which allegedly caused Plaintiffs' injuries. Plaintiffs filed a second complaint in the Tennessee Claims Commission against the State relying on the ninety day extension provided in Tennessee Code Annotated section 20-1-119 since the applicable one year statute of limitations had expired. The Claims Commission dismissed Plaintiffs' complaint as time-barred. We affirm in part, reverse in part, and remand the case to the Claims Commission.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Claims Commission
Affirmed in Part, Reversed in Part and Remanded**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

David A. Siegel, Memphis, Tennessee, for the Appellants, David Austin, Tina Austin and April Austin.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Dawn Jordan, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

On October 18, 2002, David and Tina Austin and minor child, April Austin, were involved in an automobile accident at the intersection of Mount Pleasant Road and State Highway 57 in Fayette County, Tennessee. On June 4, 2003, the Austins filed a complaint in Fayette County Circuit Court against the City of Somerville and Fayette County for personal injuries resulting from the accident. Plaintiffs' complaint alleged that Fayette County had allowed a number of hazardous conditions to exist which resulted in Mr. Austin running their vehicle through a stop sign and into a ditch. Specifically, the complaint alleged that the defendants were negligent:

- a. In failing to properly place a stop sign, so as to be visible at night, at the intersection of Mt. Pleasant Road and State Highway 57, thereby creating a defective, unsafe and dangerous condition;
- b. In failing to place adequate warning signs along the roadway to warn motorists of the defective, unsafe, and dangerous condition;
- c. In failing to take reasonable action to make the roadway safe for motorists, after having actual or constructive knowledge of the defective, unsafe and dangerous condition;
- d. In failing to adequately illuminate the area with proper lighting, thereby creating a defective, unsafe and dangerous condition;
- e. In failing to place and maintain proper traffic control devices, including but not limited to, barricades, barriers, signs or other objects, so as to prevent motorists, such as the plaintiffs in the instant case, from plunging into the ditch at the end of the roadway;
- f. In failing to properly maintain the vegetation in the area leading up to the stop sign so as to allow motorist traveling on the aforementioned roadway an unobstructed view of the stop sign.

On October 17, 2003, Fayette County filed its answer alleging that the State of Tennessee, a non-party, was responsible for the maintenance and placement of the stop sign as well as the maintenance of the highway and intersection at Mount Pleasant Road and State Highway 57. In pertinent part the answer stated:

- 4. The Defendant denies the allegations of Paragraph IV of the Complaint; that the sign located at the intersection of Mt. Pleasant Road and State Highway 57 in Fayette County, Tennessee was commissioned, contracted, authorized and placed by the State of Tennessee; that it is located within the State of Tennessee's right of way and that the State of Tennessee has complete control over said right of way; that the Defendant would further show that said intersection is not within the City limits of the City of Somerville and over thirteen miles away from the City limits of Somerville; that neither Fayette County nor the city of Somerville was [sic] engaged in the maintenance of the roadway at or near the intersection of Mt. Pleasant Road and Highway 57 including but not limited to the maintenance of lighting, barricades and other traffic devices as they were under the control of the State of Tennessee.
- ...
- 14. That the Defendant affirmatively avers that the intersection in question in this civil action is under the control of the State of Tennessee and that this

Complaint should be dismissed as to the Defendant, Fayette County, Tennessee.

...

SEVENTH DEFENSE

21. That the traffic sign in question was not placed there by Defendant, Fayette County, Tennessee; that it is in the right of way of the State of Tennessee; that it is under the control of the State of Tennessee; that Fayette County, Tennessee has no control over said stop sign, its placement, maintenance, etc and that it cannot be held liable for the stop sign regardless of its condition.

On January 7, 2004, Claimants filed a suit against the State of Tennessee in the Tennessee Claims Commission asserting:

This action is brought pursuant to T.C.A. §20-1-119(a)(2)(f) and (g). Specifically, plaintiffs would show that on June 4, 2003 they filed a Complaint for Damages in the Circuit Court of Fayette County, Tennessee, at Somerville, docket number 4507, currently pending in said Court. The defendant, Fayette County, Tennessee, filed an answer alleging, among other things that the State of Tennessee is the proper entity to be named in this action rather than Fayette County, Tennessee.

Specifically, Fayette County, Tennessee has alleged that the sign located at the intersection of Mt. Pleasant Road and State Highway 57 in Fayette County, Tennessee was commissioned, contracted, authorized and placed by the State of Tennessee; that it is located within the State of Tennessee's right of way and that the State of Tennessee has complete control over said right of way; that said intersection is not within the city limits of the City of Somerville and over thirteen (13) miles from the city limits of Somerville; that neither Fayette County nor the City of Somerville was engaged in maintenance of the roadway at or near the intersection of Mt. Pleasant Road and Highway 57, including but not limited to, the maintenance of lighting, barricades and other traffic devices as they were under the control of the State of Tennessee.

Therefore, and in accordance with the T.C.A. §20-1-119(a)(2)(f) and (g), this action was brought within ninety (90) days of the filing of the Answer to Complaint by Fayette County, Tennessee, alleging the identity of the State of Tennessee as the proper entity to be named, wherein Fayette County has effectively alleged that the State of Tennessee caused or contributed to the injury or damage for which plaintiffs seek recovery.

Tennessee Code Annotated section 20-1-119(a)(2) provides:

(a) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of

limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against such person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging such person's fault, either:

- (1) Amend the complaint to add such person as a defendant pursuant to Rule 15 of the Tennessee Rules of Civil Procedure and cause process to be issued for that person; or
- (2) Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an "original complaint initiating the suit" or "an amended complaint" for purposes of this subsection.

Tenn.Code Ann. § 20-1-119(a).

On April 15, 2004, the State filed a motion for summary judgment asserting that Claimants were not entitled to rely on the ninety day extension provided in Tennessee Code Annotated section 20-1-119(a) because Defendant Fayette County's answer failed to name the State as a comparative tort-feasor. On February 16, 2005, the Claims Commission granted the State's motion for summary judgment finding that the applicable one year statute of limitations had expired and Claimants could not rely on Tennessee Code Annotated section 20-1-119(a). Claimants appeal asserting that the Claims Commission erred in finding that their claim was time-barred.

Before we discuss Claimants' appeal, we would note that the Austins also appealed the Claims Commission's decision granting the State summary judgment as to minor child, April Austin's claim. However, the State concedes that the Claims Commission erred in dismissing the minor child's claim since the minor's suit does not expire until after she reaches the age of majority. Tenn.Code Ann. § 28-1-106. In this case, the minor's suit was filed more than three years in advance of the running of the statute of limitations set forth in Tennessee Code Annotated section 28-1-106. We therefore remand the minor child's case to the Claims Commission.

The grant of summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn.R.Civ.P. 56.04. In making this determination, the court "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). "Since summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment." *Hambree v. State*, 925 S.W.2d 513, 515 (Tenn.1996).

The Claims Commission Act specifically bars claims against the State unless written notice is given to the Division of Claims Administration within the appropriate statute of limitations period relative to the particular cause of action. Tenn.Code Ann. § 9-8-402(a) and (b). Personal injury claims are governed by Tennessee Code Annotated section 28-3-104, which provides that all actions for personal injury must be brought within one year of the accrual of the cause of action. According to the complaint, the accident giving rise to the Claimants' cause of action occurred on October 18, 2002. However, Claimants failed to file the instant action with the Division of Claims Administration until January 7, 2004, more than two months after the statute of limitations provided in Tennessee Code Annotated section 28-3-104 had expired.

Claimants assert however that their claim was timely filed pursuant to Tennessee Code Annotated section 20-1-119(a), which provides plaintiffs an additional ninety days from the date defendants file their answer in which to file an action if certain conditions are met. The first condition and the only condition at issue in this matter is "that one of the defendants must name the comparative tortfeasor as one who 'caused or contributed to the injury or damage for which the plaintiff seeks recovery.'" *Townes v. Sunbean Oster Co., Inc.*, 50 S.W.3d 446, 452-53 (Tenn.Ct.App.2001) (citing Tenn.Code Ann. § 20-1-119(a)). The state argued and the Claims Commission agreed that because the County failed to allege comparative fault in its answer, the statute's application was not triggered.

However, Claimants assert that they were driving on Mount Pleasant Road when they approached the intersection and that their complaint alleged that the County was negligent in the maintenance of that road. Claimants reason that because the County identified the State as the party with control over the stop sign and intersection while admitting that it controlled Mount Pleasant Road, the County effectively raised comparative fault as a defense. We do not believe that this is a correct assertion of the law.

In *Matthews v. Story*, No. E2002-00517-COA-R3-CV, 2003 WL 179978, at *1 (Tenn.Ct.App. Jan. 28, 2003), the Court considered the timeliness of an amendment to add a defendant pursuant to Tennessee Annotated section 20-1-119(a). In that case, plaintiff sued a sole defendant, Morelock, for injuries sustained when passenger Morelock allegedly distracted plaintiff and caused plaintiff's vehicle to veer off the roadway. *Matthews*, 2003 WL 179978, at *1. When plaintiff later learned that the negligent passenger was actually Morelock's daughter, Natasha Story, plaintiff attempted to amend his complaint. *Matthews*, 2003 WL 179978, at *1. The trial court however dismissed plaintiff's claim, holding that the statute of limitations barred the amendment. *Matthews*, 2003 WL 179978, at *2. The Court of Appeals affirmed the decision of the trial court stating:

The *Brown* Court pointed out that the legislature responded to one aspect of *McIntyre* by enacting Tenn.Code Ann. § 20-1-119, which "enable[s] a plaintiff to plead and serve nonparties alleged in a defendant's answer *as potential tortfeasors* ... [if] a defendant raises comparative fault as an affirmative defense and the statute of limitations would otherwise bar the plaintiff's cause of action against the

comparative tortfeasor alleged in defendant's answer.” *Brown*, 12 S.W.3d at 788 (emphasis added). As pertinent to the case at bar, the question is whether or not a named defendant has asserted, as an affirmative defense, the fault of another.

In the instant case, Morelock never raised the defense of comparative fault, nor did she allege that Story was, or even might be, at fault. On the contrary, the stipulations of fact contained in the record recite that Morelock's attorney informed counsel for the plaintiff that “Morelock was not in the vehicle at the time of the accident, but her daughter, Natasha Story, was using the car owned by the defendant Morelock, and was a passenger in the car being driven by the plaintiff; *therefore, the wrong person had been sued*.” (Emphasis added). As the plaintiff has stipulated, the lawyer for Morelock was simply informing his counterpart that the plaintiff had sued the wrong person; Morelock's counsel was not raising the comparative fault of Story. These two concepts are separate and distinct, as illustrated by our decision in *Hodge v. Jones Holding Co.*, No. M1998-00955-COA-R3-CV, 2001 WL 873458, 2001 Tenn.App. LEXIS 567 (Tenn. Ct.App. M.S., filed Aug. 3, 2001).

In *Hodge*, the plaintiff argued that the defendant construction company should not have been allowed to assert that the plaintiff sued the wrong company since the defendant failed to affirmatively plead the defense of comparative fault, as required by Tenn. R. Civ. P. 8.03. *Id.* at *1, 2001 Tenn.App. LEXIS 567, at *2. This court agreed with the defendant's position on the issue before it:

[The defendant] was not asserting the comparative fault affirmative defense in this case. Rather than seeking to lay off all or a part of the fault for [the plaintiff's] injuries on another tortfeasor, it was simply asserting that it was not the construction company responsible for the road construction where [the plaintiff] was injured.

Id. at *5, 2001 Tenn.App. LEXIS 567, at *15.

Similarly, in the instant case, Morelock was not raising the defense of comparative fault when her counsel informed the plaintiff's counsel that the plaintiff had sued the wrong person. Because Morelock did not raise comparative fault as an affirmative defense, the 90-day extension provided for in Tenn.Code Ann. § 20-1-119 never came in to play case (sic) and the plaintiff cannot rely upon it. The plaintiff's attempt to add Story as a defendant is barred by the one-year statute of limitations. Therefore, we find no error in the trial court's dismissal of the plaintiff's action against Story.

Matthews, 2003 WL 179978, at *3.

Similarly to the defendant in *Matthews*, Fayette County's answer merely alleged that the incorrect party had been sued as to the claims concerning the maintenance of the stop sign, the intersection, and the highway. Comparative fault refers to the process of apportioning damages

among multiple or joint tortfeasors according to the percentage of fault attributable to those persons after reduction for the plaintiff's percentage of negligence. *Owens v. Truckstops of America*, 915 S.W.2d 420, 425 (Tenn.1996). In its answer, Fayette County did not allege that the State was wholly or partly responsible for Claimants' injuries. Rather, the County denied the allegations in the complaint and asserted that it could not be liable for any injuries resulting from the allegedly negligent maintenance or placement of the stop sign, intersection, or highway because that property was in control of the State. Asserting that another party *controls* the instrumentality of a plaintiff's injuries is not the same as claiming that another party *caused* a plaintiff's injuries.

Claimants further contend that their case is analogous to *Romine v. Fernandez*, 124 S.W.3d 599 (Tenn.Ct.App.2003). In *Romine*, plaintiff patient alleged that defendant physician, Dr. Morris and the associated hospital were guilty of negligence in the care of plaintiff and in the administration of the drug Toradol. 124 S.W.3d at 601. In their answer, Dr. Morris and the hospital acknowledged that plaintiff had been administered Toradol however they denied that it was administered at Dr. Morris' order. *Romine*, 124 S.W.3d at 601. Dr. Morris further asserted that:

Dr. Morris has no knowledge of any act of medical negligence committed by any other defendant or third party in the care and treatment of the plaintiff. However, in the event that the plaintiff's allegations of negligence on the part of the co-defendants are true, and if the plaintiffs are successful in presenting a factual basis for those allegations, then in that instance Dr. Morris invokes the doctrine of comparative fault and says that under no circumstances would he be liable for more than a proportionate share of the total fault.

Romine, 124 S.W.3d at 601.

Relying on Tennessee Code Annotated section 20-1-119, plaintiff amended his complaint to add Dr. Isom and Ms. Fernandez, a certified registered nurse anesthetist, after the applicable statute of limitations had expired. *Romine*, 124 S.W.3d at 601. Plaintiff claimed that Dr. Isom had ordered the administration of Toradol, that Ms. Fernandez and Dr. Morris were aware that the drug had been prescribed, and that all defendants were negligent in the care of plaintiff and in the administration of Toradol. *Romine*, 124 S.W.3d at 601. On appeal, the court affirmed the trial court's decision to allow plaintiff to amend his complaint pursuant to Tennessee Code Annotated section 20-1-119 reasoning that the language in Dr. Morris' answer was sufficient to invoke the doctrine of comparative fault. *Romine*, 124 S.W.3d at 604.

We believe that *Romine* is inapposite to the present action. Although the defendant physician in *Romine* denied fault, his answer went on to specifically invoke the doctrine of comparative fault and to argue that if negligence was shown, he should be liable for no more than a proportionate share of fault. As we stated above, the County in this case never asserted comparative fault as an affirmative defense. Instead of placing some or all of the fault for Claimants' injuries on the State,

the County merely asserted that it was not the party responsible for the stop sign, intersection, or roadway where Claimants were injured.

Finally, it is apparent that Plaintiffs do not assert, either in their original complaint against Fayette County or in their complaint against the State before the Claims Commission, that any comparative fault exists. In the complaint against Fayette County, Plaintiffs assert that the accident occurred “at the intersection of Mt. Pleasant Road and State Highway 57 in Fayette County.” When the answer filed in circuit court by Fayette County asserted that the State was responsible for the matters in issue, Plaintiffs then filed their complaint against the State alleging that the State was negligent:

- a. In failing to properly place a stop sign, so as to be visible at night, at the intersection of Mt. Pleasant Road and State Highway 57, thereby creating a defective, unsafe and dangerous condition;
- b. In failing to place adequate warning signs along the roadway to warn motorists of the defective, unsafe, and dangerous condition;
- c. In failing to take reasonable action to make the roadway safe for motorists, after having actual or constructive knowledge of the defective, unsafe and dangerous condition.
- d. In failing to adequately illuminate the area with proper lighting, thereby creating a defective, unsafe and dangerous condition.
- e. In failing to place and maintain proper traffic control devices, including but not limited to, barricades, barriers, signs or other objects, so as to prevent motorists, such as the plaintiffs in the instant case, from plunging into the ditch at the end of the roadway;
- f. In failing to properly maintain the vegetation in the area leading up to the stop sign so as to allow motorist traveling on the aforementioned roadway an unobstructed view of the stop sign.

The whole purpose of Tennessee Code Annotated section 20-1-119(a)(2) is to alleviate problems facing plaintiffs in the wake of comparative fault as adopted in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn.1992). Prior thereto, common law joint tort-feasors were jointly and severally liable for all damages suffered by Plaintiff. *Plough, Inc. v. Premier Pneumatics, Inc.*, 660 S.W.2d 495, 498 (Tenn.Ct.App.1983).

With the adoption of comparative fault in *McIntyre*, joint and several liability was abrogated with the Court holding:

Third, today's holding renders the doctrine of joint and several liability obsolete. Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

Further, because a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence, situations where a defendant has paid more than his "share" of a judgment will no longer arise, and therefore the Uniform Contribution Among Tort-feasors Act, T.C.A. §§ 29-11-101 to 106 (1980), will no longer determine the apportionment of liability between codefendants.

McIntyre, 833 S.W.2d at 58 (footnote omitted).

A plaintiff suing a defendant tort-feasor may well be unaware of another tort-feasor who might be severally liable for part of his damages. Since the named tort-feasor would be only liable for his comparative fault rather than jointly and severally liable with other tort-feasors, the named tort-feasor could refuse to disclose other tort-feasors then known to him until after the statute of limitations had expired as to the other tort-feasors. After which, he could name such other tort-feasors and gain the benefit of a comparative fault allocation without exposing such other tort-feasors to liability to the plaintiff for their allocated percentage of fault. Under such conditions, the prudent plaintiff fires in the dark with a very wasteful shotgun approach and hopes to hit other targets.

Tennessee Code Annotated section 20-1-119 is a legislative imposition designed to provide a ninety-day window following the named defendant's answer within which a plaintiff may join other tort-feasors pointed out by the named defendant. Its applicability is limited however to "civil actions where comparative fault is or becomes an issue." Neither the original Complaint against Fayette County, the answer of Fayette County, nor the original complaint against the State of Tennessee in the Claims Commission makes comparative fault an issue in this case.

Plaintiffs timely sued Fayette County, and more than one year after the date of the accident, Fayette County answered, not seeking a comparative fault with the State of Tennessee, but asserting that the State was entirely responsible for the intersection in issue. Plaintiff then filed its complaint against the State in the Claims Commission, not asserting any comparative fault, but rather asserting that the State was responsible for the intersection of Mt. Pleasant Road and State Highway 57. Tennessee Code Annotated section 20-1-119 is inapplicable, and the Claims Commission correctly granted summary judgment to the State of Tennessee because of the expiration of the statute of limitation.

The judgment of the Claims Commission is affirmed as to David and Tina Austin, but reversed to the minor child, April Austin. The case is remanded to the Claims Commission for further proceedings. Costs of the cause are assessed one-half against David and Tina Austin and one-half against the State of Tennessee.

WILLIAM B. CAIN, JUDGE